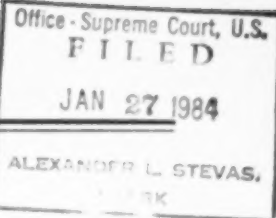


No. 83-1088



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

AUBREY NICHOLS, - - - - - Petitioner,

versus

COMMONWEALTH OF KENTUCKY, - Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

Where the Trial Court and the Supreme Court of Kentucky Found There Was Sufficient Evidence to Sustain a Conviction in the Petitioner's First Trial Which Ended in a Mistrial, Was the Petitioner Placed in Double Jeopardy by Being Retried?

II.

On a Petition for Writ of Certiorari Will This Court Review the Sufficiency of the Evidence in a Trial Which Ended in a Mistrial Due to a Hung Jury?

III.

Is a Second Trial After a Properly Declared Mistrial Double Jeopardy?

IV.

Where the Petitioner Did Not Attempt an Appeal After a Mistrial, Does He Have Standing to Raise the Issue of the Right to Such an Appeal?

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AUBREY NICHOLS, - - - - - *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, - *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Commonwealth of Kentucky, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Supreme Court of Kentucky's decision in this case, No. 82-SC-517-DG, rendered: June 15, 1983.

REASONS WHY THE WRIT SHOULD BE DENIED

1. On review by the state appellate court the evidence in the first and second trial was found to be sufficient to sustain conviction and the judgment of the second trial was affirmed.

The petition falsely states: "A reviewing court found insufficient evidence to sustain conviction of the crime charged." The truth is, the Court of Appeals reviewed the evidence in the first trial and found it

sufficient to take the case to the jury; since the jury was unable to reach a verdict and a mistrial was declared, the court held that the petitioner was not placed in double jeopardy by being retried. The Court of Appeals affirmed the judgment of conviction of the second trial. The Supreme Court of Kentucky reviewed the evidence of the first and second trials and the other issues, including double jeopardy, and affirmed the petitioner's conviction.

Since no appellate court has found that there was insufficient evidence to sustain the judgment of the trial court the facts in this case are inapposite the facts in *Burks v. United States*, 437 U. S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978). In *Burks* an appellate court found that the prosecution had presented insufficient evidence of criminal responsibility against the defendant but remanded for a new trial. This Court held that where the appellate court found that there was insufficient evidence on an essential element of the offense the judgment should be reversed and remanded for dismissal of the indictment rather than for a new trial. In *Burks* the judgment was reversed by the reviewing court. In the case at bar the judgment was affirmed by the reviewing courts, both the Court of Appeals and the Supreme Court of Kentucky.

2. **The reviewing of evidence in a trial which ended in a mistrial is not a function requiring the services of this court because no important federal question is presented.**

The petitioner is seeking to have this Court review the quantity and quality of the evidence in his first

trial which ended in a mistrial. He complains that there was only one eye-witness, that the witness was biased and vacillating and too far away to observe what happened. That, of course, was for the jury to consider. The one eye-witness testified that the victim had locked herself in an automobile and that the petitioner deliberately shot through the closed car window. There was also physical evidence that the death wound was caused by a bullet which entered the back of the victim's head and emerged from her forehead, thus contradicting the petitioner's claim that the wound was inflicted during a scuffle over the gun.

After the trial court overruled a motion for a directed verdict of acquittal at the close of the Commonwealth's case the petitioner presented evidence in his defense, including his own testimony. Since the petitioner presented a defense his motion for directed verdict at the close of all the evidence had to be considered in the light of all the evidence, including defense evidence, and after consideration the trial court denied the motion.

There is no important federal question for this Court to review in regard to sufficiency of evidence.

3. It does not constitute double jeopardy to try a defendant again after a mistrial.

"It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered. . ." *Kepner v. United States*, 195 U. S. 100 at 130, 49 L. Ed. 114, 24 S. Ct. 797. Cited in *Burks v. United States* at 437 U. S. 7.

The petitioner has never been acquitted, either by a judge or a jury. No appellate court has found that there was insufficient evidence to convict the petitioner. He has not been subjected to double jeopardy.

4. The petitioner did not attempt to appeal from his first trial (mistrial) and, therefore, has no standing to raise the procedural issue of whether an appeal can be taken from an order overruling a motion for a directed verdict due to insufficient evidence.

CONCLUSION

The Petitioner for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 83-1088

COMMONWEALTH OF KENTUCKY, - - Respondent.

I, Carl T. Miller, Jr., a member of the bar of the Supreme Court of the United States and counsel of record for respondent, hereby certify that on January —, 1984, pursuant to Rule 28.5(b), Rules of the Supreme Court, I served three copies of the Respondent's Brief in Opposition, by mailing United States Postage, first-class postage prepaid, to Hon. William M. Scalf, Scalf, Geisler and Noble, 600 Security Trust Building, Lexington, Kentucky 40507, Attorneys for Petitioner.

Al parties required to be served have been served.

Dated: January ____, 1984.

CARL T. MILLER, JR.

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